> limitation? We in this committee have not brought in any measure of a regulatory character. The amendment that I propose is simply an amendment of limitation and preservation of existing powers."

At page 9479 we find the interesting statement in response to the suggestion that the President already had the power to take over the wire systems:

> "Mr. Sims: I think I can suggest a fair approach to an answer to the question whether or not the President has the power contained in this resolution, that it was submitted to the Department of Justice and after a thorough investigation and study the Department of Justice reported to the President that he did not have the authority."

At page 9481 the title was then amended by unanimous consent to correspond with the resolution. The resolution came up for consideration in the Senate in its amended form July 6th, page 9502, and under the present title, and was referred to the committee on interstate commerce.

On July 8th, page 9610, it was reported back without recommendation, after consideration of a little over an hour (p. 9611).

On page 9506 it was stated by Senator Cummins:

> "It will be, in my opinion, no short job to compose the legislation which is necessary to take over these properties. I do not want it to happen again, as it has happened with the railroad companies, that immediately after their occupation or possession by the government we experience an increase of anywhere from 25 to 300 percent in the rates. When we take over the telephones of the country * * * and take over the telegraph companies, I think it is

manifest we ought to take them over under such conditions as will protect the people of this country against unjust rates."

On page 9614, we find the suggestion made as to the possibility of a strike. It was stated at 9614 by Mr. Penrose:

"Mr. President, I do not think in the history of any legislative body from here to Russia has a more high-handed proceeding been perpetrated than that which we have witnessed this afternoon. I speak cooly and advisedly, although my indignation runs high. We are supposed to be in a battle for liberty and to be engaged in a tremendous conflict to bring about the downfall of autocracy, and yet here in the Senate of the United States every principle of orderly constitutional procedure and of liberty has been outraged and violated."

And at page 9617, it was referred back to the committee. On July 10th, page 9685, it was again reported and read by title. At page 9729 on July 11th, the matter was again brought up for consideration. Reference was made by Mr. Smith to the question of tolls in the following language and upon possible abuse:

"The question of tolls and rental and hours of service is very important to the telephone patrons, and any unnecessary interference with present plans should have the most careful consideration."

This discussion was resumed on July 11th, page 9732. It was stated at page 9733 by Mr. Underwood:

"I will say to the Senator from Ohio that so far as I know there is no emergency which exists in this hour for this legislation. That is the reason why I did not think there were any hearings necessary."

In discussing the purpose and effect of the Act, Senator Smith of South Carolina said:

(Page 9747.)

"Mr. Smith (South Carolina, chairman Interstate Commerce Committee): If the Senator will permit me, this is simply an enabling act. If it should transpire that further legislation is necessary in order to preserve the public welfare in this emergency, doubtless we would adopt the same procedure as we did with reference to the railroads."

* * * * *

Referring further to the analogy with the proceedings in the railroad act.

"Smith (South Carolina): But we did not, if the Senator will allow me, have any hearings on the *enabling act*. It was simply when we *undertook* to *enlarge the scope of the authority* that hearings were held.

* * * * *

Mr. Kellogg: Mr. President, if the Senator will permit me, when the enabling act was passed in relation to the railroads, nobody dreamed that it gave power to take over all the railroads in the United States. It simply provided for the taking over of railroads necessary for the transportation of government supplies and material; and it was passed, with a view to the situation on the Mexican border and nothing else.

Mr. Smith (South Carolina): If the Senator from Ohio will allow me further, I should like to suggest to the Senator from Minnesota that the same thing is true of the present legislation. Suppose the President had seen fit to confine himself simply to a comparatively small use of the railroads for military purposes. *Then the subsequent legislation would not have been necessary.* Suppose he simply finds it

necessary to take over a few telegraph and telephone lines for military purposes in the emergency. *Then no subsequent legislation will be necessary.* I think, however, he will pursue the same course with reference to this subject that he did in regard to the railroads if he finds that it is necessary to have additional legislation in order to attain the object sought."

(Page 9833):

"Harding: Mr. President, while the chairman of the committee is on his feet, I want to ask him if he has any information as to what the government expenditure is going to be in taking over these properties, and securing its service alone, not thinking in any way of the maintenance of the service which the individual citizen gets?

Smith (South Carolina): Mr. President, as I understand this question, of course it may be due to my obtuseness, but my understanding of it is that it is to enable the government to assume control, if the circumstances jutsify it, of any part or the whole, if need may be. Of course, I do not suppose they can determine what will be the subsequent necessary procedure until the emergency has crystallized to a point where they will put their hands on whatever is necessary for the common defense; and then, perhaps—I am just making this as a suggestion—the *legislation* may take a line similar to that which was taken when, under the enabling act, the railroads were taken."

MACLEOD ET AL., CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MASSACHUSETTS, *v.* NEW ENGLAND TELEPHONE & TELEGRAPH COMPANY.

CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

No. 957. Argued May 5, 6, 1919.—Decided June 2, 1919.

Decided on the authority of *Dakota Central Telephone Co.* v. *South Dakota, ante*, 163.
232 Massachusetts, 465, affirmed.

THE case is stated in the opinion.

Mr. William Harold Hitchcock, Assistant Attorney General of the Commonwealth of Massachusetts, with whom *Mr. Henry C. Attwill*, Attorney General of the Commonwealth of Massachusetts, was on the brief, for petitioners:

The respondent through its officers and employees is now operating the telephone system owned by it as an instrumentality of the Federal Government.

It follows, therefore, that, if the power to regulate intrastate rates has been reserved to the States by the joint resolution under consideration, the respondent is the proper agency in Massachusetts against which the exercise of that power should be directed.

Jurisdiction of Massachusetts over the regulation of intrastate telephone rates, after action by the President under the Joint Resolution of July 16, 1918, was reserved to it by that resolution. We raise no question but that Congress had the power to authorize, or even to require, the taking over of the telegraph and telephone systems of the country by the Federal Government for military purposes and "for the common defence."

It may be conceded that it was well within the limits of federal power, when these systems had thus been taken over as a war measure, entirely to exclude the public from their use, if the exigencies of the war fairly warranted such action. When, however, it has been found not inconsistent with the purpose for which these systems had been taken over to permit the public to continue to use them, it would seem that the determination of the amount to be charged for such use had no relation whatever to the conduct of the war or the exercise of the war powers. Obviously, Congress could not authorize the taking of these systems by the Federal Government solely for revenue purposes even during time of war. It may be suggested that, the systems having been taken over and the public having been permitted to use them so far as not inconsistent with government use, it was within the power of Congress to authorize, and of the President and his representatives to exercise, the regulation of the rates to be charged for such service entirely within a State as a mere incident of government operation for war purposes. If this be so, such regulation must be strictly confined to its mere incidental purpose. It cannot be extended to make the dominant purpose of the exercise of such a power the raising of revenue or, *a fortiori*, the standardizing of telephone rates upon a uniform basis throughout the Nation in the assumed interest of the telephone users of the country, which was the admitted purpose of the establishment of the rates in question. Such action seems to go beyond the scope even of the far-reaching war powers. However, no such difficult and delicate question arises in this case. Congress foresaw the serious difficulties which might arise from such a conflict between national and state powers at a time when harmony was essential. It, therefore, appears to have determined that these most fundamental powers of the States should be interfered with as little as possible. The question now before the

court turns entirely upon the interpretation to be given to this proviso.

The language of the proviso of the joint resolution itself shows that the phrase "police regulations" is there used in its broadest sense. The express exceptions from the power reserved to the States show the breadth of that reservation. The control of the issue of stocks and bonds is but an incident of the power to control rates. If "police regulations" was here used in any narrow sense, the exception would be meaningless.

The whole resolution indicates a purpose to authorize the taking of the telegraph and telephone systems for the direct prosecution of the war, but makes clear that, to the extent that the public is to be permitted to use them as before, the regulative powers of the States should not in any wise be limited except as expressly stated. The prosecution of the war required the prompt transmission of government messages under conditions which would insure secrecy. It had no possible relation to the cost of service to private users of these systems.

The history of the joint resolution, particularly of the language of the proviso under consideration, plainly points to the same conclusion.

This suit is not beyond the jurisdiction of the Massachusetts court on the ground that the United States is a necessary party or that the suit is in effect against the United States.

The Solicitor General for respondent. See *ante*, 164.

Mr. William I. Schaffer, Attorney General of the Commonwealth of Pennsylvania, and *Mr. Bernard J. Myers*, Deputy Attorney General of the Commonwealth of Pennsylvania, by leave of court, filed a brief as *amici curiæ*, on behalf of the Commonwealth of Pennsylvania.

Mr. Charles E. Elmquist, by leave of court, filed a brief as *amicus curiæ*, on behalf of thirty-seven States and the National Association of Railway and Utilities Commissioners.

Mr. John G. Price, Attorney General of the State of Ohio, by leave of court, filed a brief as *amicus curiæ*, on behalf of the State of Ohio.

Mr. Albert C. Ritchie, Attorney General of the State of Maryland, by leave of court, filed a brief as *amicus curiæ*, on behalf of the State of Maryland.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The petitioners, composing the Public Utilities Commission of the State of Massachusetts, filed their bill against the respondent to compel it to enforce certain telephone rates for intrastate business established in conformity to the state law and to forbid the putting into effect of conflicting rates fixed by the Postmaster General in a schedule by him established and the enforcement of which he had ordered.

On the petition and answers the case was reserved for the consideration of the Supreme Judicial Court where it was finally decided. The court in a lucid opinion, speaking through Mr. Chief Justice Rugg, having after full consideration reached the conclusion that the Postmaster General was empowered by the law of the United States to fix the schedule of rates complained of and that the Telephone Company was authorized by such law to put in effect and enforce such rates even though in doing so the rate established by the Public Service Commission of the State was disregarded, held that the suit was virtually one against the United States which the court was without

195. Counsel for the United States.

power to entertain and entered a decree of dismissal for want of jurisdiction. But the form of the decree thus entered affects in no way the control and decisive result, upon every issue in the case, of the ruling this day announced in *Dakota Central Telephone Co.* v. *South Dakota*, *ante*, 163. It follows therefore that in this case our decree must be and is one of affirmance.

Affirmed.

MR. JUSTICE BRANDEIS dissents.